1951 **K** **File No.** O Transfer of Legal Depts 51

A. **BRANCH**

Subject:— Opinions Under the

Transfer of property

Act- 1882

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10.		18277 22-10-51	Section 53. Whether it would be possible for Govt. to avoid the sale of the land to Shri Tulsiram unless it would be established that the transferee was a party to the fraud.	25-26.

20837 4-10-51	17655 7-11-51	Whether property purchased by Nijappa and Mallikarjun may be proceeded against for recovering the excise ~~xxxxxxx~~ arrears due from Shri Appaji who stood surety for his son, ex-Excise licensee. 33-38

SVV
30.6.56.
5 c.

R.I. No. 2651 dt. 8-8-1951.

Submitted.

Please see Collr. of Baroda's letters at pp. 45-47, 65 ante and R.B. note at p. 68 ante. It appears that a license for carrying marble and building stones in 8 villages of Chheta Udepur was granted to Sir Chinubhai Madhavlal Baronet of Ahmedabad for a period of 10 years from 1938. Thereafter it was transferred to the Gujarat Marbles Ltd. in 1942. It is stated that the period of the license was increased from 10 to 13 years. Under condition 17 of the licence the company had to pay minimum gurantee as stated therein. The company was exempted from payment of the minimum guarantee for 1939-40 and 40-41 and of half the amount for 1945-46. As no amount was paid the Dewan asked the company to pay the dues in arrears (1) Rs. 7550/- for 1945-46 (2) Rs. 14700/- for 1946-47 and (3) Rs. 14700/- for 1947-48 totalling Rs. 36750/- with interest at 9%. The license was cancelled by this Government for breach of condition of not paying regularly the amount of minimum gurrantee fixed under condition 17. (See pp. 23 ante.). The Collector has stated recovery proceedings against the company. The Collector is of the view that since the license in question was cancelled on 8-3-48 the company is liable to pay the amount of the minimum gurrantee upto that date together with the interest as provided for in the licence. R.D. states that the proposal made by the Collector is reasonable and may be accepted. The R.E.A. is requested to advise.

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4 c.

Legal Department.

The Collector's proposal for the recovery of the proportionate minimum guarantee amount for the period from 1-11-48 to 8-3-1949 is in order. The Collector's view, however, that under clause 17 of the licence the minimum guarantee was payable by the licensee every year in advance is borne out by the terms of that clause. Reading clause 17 with clauses 4 and 5 of the licence it would appear that the royalty was to be paid before the fifth day of every month on the exports of stones in the previous month. But the royalty payable during a year was subject to the minimum guarantee amounts specified in clause 17. Under clause 18 the licensee is liable to pay interest at 9 per cent. per annum on all payments overdue towards royalty or the minimum amount of guarantee. Therefore, the interest chargeable on the amount due for the period from 1-11-48 to 8-3-1949 will have to be calculated either from 9-3-1949 or on the basis of amounts which would have been payable monthly on the basis of exports during that period.

Sd./-
Additional Secretary to Government.

U.R. to R.D., No. 6647, dated the 2nd March, 1951.

SVV
30.6.56.
4 c.

Legal Department.

Transfer of Property Act, 1882, Sec. 52.

The view at 'A' of the Deputy Registrar's letter at page 1 ante is correct. Since the title to the property is in dispute and it is difficult to anticipate the result of the pending litigation, it would not be safe to advance the loan on the security of the property. The result of the litigation may be awaited.

Sd./-
Additional Secretary to Govt.

U.R. to R.H.D., No. 4686; dated the 24th March, 1951.

SVV
30.6.56.
4 c.

Legal Department.

Execution of mortgage deed.

A mortgage-deed is a unilateral document to be executed by the debtor alone and does not require execution on behalf of Government. The question whether the authority who executes the mortgage deed would be the competent authority to take possession of the mortgaged property does not therefore arise. Government may either by a special or general order authorise one or more officers to exercise the powers.

Sd./-
Additional Secretary to Govt.

U.O. to E.F.D., No. 6488; dated the 23rd April, 1951.

SVV
30.6.56.
4 C.

R.L. No. WP1 dt. 2-6-51.

Submitted.

2. In the R.L.A.'s opinion No. 1846, dated 29-12-1950 it was stated that the execution of mortgage bonds by the Camp Commandant and Estate Managers on behalf of the Director of Rehabilitation would be invalid and fresh mortgage bonds should be taken in such cases. Under Additional Secretary's opinion No. 6289 dated 16-4-1951 it was pointed out that the authorisation of the Camp Commandants and Estate Managers retrospectively would not be proper. The R.H.D. has now invited attention to Additional Secretary's recent opinion No. 6488, dated 23-4-1951 wherein it has been held that a mortgage-deed is a unilateral document to be executed by the debtor alone and does not require execution on behalf of Govt. In view of this opinion that Deptt. has dropped its earlier proposal to authorise the Camp Commandants and Estate Managers and to take fresh mortgage-bonds. The R.L.A. is requested to advise.

3. In view of Additional Secretary's opinion No. 6488, dated 23-4-51 it would not be necessary either to take fresh mortgage bonds in place of those executed by the Camp Commandants and Estate Managers or to authorise these officers retrospectively under Article 299(1) of the Constitution.

Sd./-
Additional Secretary
to Govt.

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30.6.56.

Legal Department.

R.L.A.'s opinions
No. 12411, dated 29-12-1950
and Addl. Secy.'s opinions
No. 6089, dated 16-4-1951
and No. 6438, dated
23-4-1951.

Demand returned.

Sd./-

Additional Secretary to Government.

U.O. to R.H.D., No. 7203; dated the 8th May, 51.

SVV
30.5.51.
4 c.

Annexure

Office of the R.L.A.

Seen and returned. The view taken by Secretary, Development Department is correct. If as reported by the Collector, Surat.the bonds do not provide for the recovery of the dues from the lessee as arrears of land revenue, the recovery by coercive measures under section 187 of the Land Revenue Code would not be legally feasible. The recovery will have to be made under ordinary civil law unless the bonds expressly confer on the former State a power of sale without the intervention of the court in which case the Collector can after due notice recover by sale of the mortgaged property (see section 69(1)(b) of the Transfer of Property Act.).

Sd./-
29/6
Remembrancer of Legal Affairs.

U.R. to D.D., No. 6162; dated the 29th May, 1951.

SVV
30.6.56.
4 c.

R.I. No. 11985 dt. 6/6/51.

It appears that in view of the high cost of acquisition of the lands required for the Agricultural School at Nasik, Government decided to shift the Agricultural School to the Trimbak Vidya Mandir. Accordingly, the Director was requested to submit to Government proposals for shifting the School to the site of the Trimbak Vidya Mandir (see G.R., A. & F.D. No. 8378/ dated 7-6-50). When the negitiations were afoot for the purchase of the entire property of the Trimbak Vidya Mandir, it appears that the buildings were used by the Police Department as an annexe to the Police Training School, Nasik. In his letter dated 1-6-50, Mr. Gandhi of Birla Brothers informed the Ch. Secy. that the Trustees of the Birla Education Trust were prepared to sell the entire Trimbak Vidya Mandir property for Rs. 7,10,000/-. This offer was accepted by the Chief Secretary and Shri Gandhi was informed accordingly on 22-6-50. From the further correspondence it appears that as a tenant named Avtar Singh surrendered vacant possessionof th farm properties to the Trustees, in his letter dated 13-12-50 Mr. Gandhi requested Govt. to take immediate possession of the farm lands and farm building pending finalisation of the sale. Accordingly, the Collector of Nasik was asked, telegraphically on 23-12-50 to take immediate possessionof the property belonging to the T.V.Mandir. From the Collector's letter dated 12-1-51, it appears that the possession of the lands and buildings of the Trimbak Vidya Mandir was taken over by the Collector on 22-12-1950.

On 22-1-1951, Mr. Gandhi returned the draft conveyance deed and indemnity bond duly approved. As regards the payment of the rent due, he remarked " the rent of the property upto the date of possession will of course have to be paid by Government. The

The police Training School is responsible for the payment of the rent for the building in their possession, while rent for the buildings in possession of your Department may please be fixed upto the date of conveyance."

As regards the question of payment of rent by the Agricultural Department for the building from 29-1-1950, the date on which possession of the property was taken over by the Collector, the A.& F.D. agrees to pay it to the Birla Education Trust at the rate fixed by the E.D. As the property is now purchased by Government the question rsised is whether the rent should be paid upto the date of executing of the conveyance deed or upto the date of making payment of the price.

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Legal Department.

In the absence of an agreement to the contrary the Government will have to pay rent only up to the date of execution of the conveyance when the sale became complete and the property vested in Government. The payment of sale price is not necessarily a sine qua non to the completion of the sale.

Sd./-
Additional Secretary to Government.

U.R. to A. & F.D., No. M 9092; dated the 9th June, 1951.

SVV
30.6.56.
4 c.

R.L. NO. 958 dt. 9.5.1951.

Submitted with reference to the letter dated 7/8/51 from the Superintendent of Stamps.

The Superintendent encloses a document whereunder one Shri O.P.Deshi has assigned 3 policies of insurance mentioned in the document to his wife with a proviso that in the event of his wife predeceasing him, or in the event of his surviging the date on which the said policies would mature, the benefit of the policies shall revert to him. The Superintendent feels that the nature of the document viz. whether it is a will, settlement or the usual assignment of policy- is not free from doubt. It appears to him to fall within, the definition of "will" or it may be held as a settlement according to him, as it makes provision for a dependent. He requests for R.L.A.'s opinion.

SVV
30.6.56.
4 c.

No. 9558
Legal Department,
Bombay Castle, (Bombay No. 1), 14th June, 51.

To

The Superintendent of Stamps,
Bombay.

Subject:- Nature of document assigning conditionally policies of insurance.

Sir,

With reference to your letter dated the 7th May, 1951, regarding the subject noted above, I have the honour to enclose with this the opinion recorded by the R.L.A. on this case.

Yours faithfully,

Sd./-
Deputy Secretary to Government.

SVV
30.6.56.
4 c.

OFFICE OF THE R.L.A.

Transfer of Property Act, 1882, secs. 81 & 130.

In Shamdas Gobindram vs. Mrs. Savitribai and others (A.I.R. 1937 Sind 181) it was held:

"It is within the competence of a policy holder to make a conditional assignment of each of the policy taken out by him whether such policy is an ordinary life policy or an endowment policy providing therein that in the event of the death of the assignee the benefit of the policy would revert to him and the assignee alone is entitled to receive the sum assured in case of death of the insured before the day named." The document in question would therefore be a conditional assignment and neither a will nor a settlement.

Sd./-
Remembrancer of Legal Affairs.

SVV
30.6.56.
4 c.

Legal Department.

It appears that under their scheme of granting loans to refugees, the R.H.D. had entered into two mortgage deeds with two such persons who had purchased motor cars. The Director of Rehabilitation requested the Regional Transport Authority, Bombay, to take a note of the mortgages entered into by the two persons. The R.T.A. considers that it is not possible for him to take such a note; but has suggested that Government and the refugees concerned should enter into a hire purchase agreement in which case it would be possible for him to take a note of such agreement in view of rule 38 of the Bombay Motor Vehicles Rules, 1940. The R.H.D., however, considers that in view of the terms of the mortgage deed executed by the refugees in such cases the interest of Government is fully secured; and there is no need of accepting the suggestion made by the R.T.O. The R.L.A. is requested to advise whether the view expressed by the R.H.D. is correct.

2. Under clause 8(b) of the form of mortgage deed forwarded by the R.H.D. the mortgagor covenants with the mortgagee (Government) that the moneys secured under the deed shallbe a first charge on the mortgaged property and shall take precedence over all the moneys due at the time of the execution of the mortgage or which may be borrowed by the mortgagor afterwards. This provision is not sufficient to establish the first charge of Government in case the mortgagee happens to dispose of the motor cars in favour of bona fide transferee for value. "A mortgage of moveables is liable to be defeated if the mortgagor in possession sells the goods to a bona fide purchaser without notice." (Please see Mulla's Transfer of Property Act, 2nd Edition pp. 257-258). As observed by the Madras High Court in Narasimh vs. Venkatramiah ((1919) 42 Mad. 89) "When goods are left in the possession of the mortgagor, a wide door is left open for fraud, and when the mixt equities between the innocent purchaser and the mortgagee have...be..

have to be weighed, the preponderance must be given to the purchaser, for the mortgagee has, by his omission to secure possession of the good, facilitated the commission of the fraud." For these reasons the view expressed by the R.H.D. (pp. 17-18 ante) that the interest of Government would be secure under the mortgage deed does not appear to be correct.

3. The suggestion to request the R.T.A. to take a note of the mortgage-deed is intended as a safe-guard against the mortgagor transferring the mortgaged motor car to a bona fide transferee for value. Since it cannot be done under the Bom-bay Motor Vehicle Rule, 1940, matter need not be pursued further.

Sd./-
Additional Secretary to Government.

U.R. to R.H.D., No. 12936; dated the 11th August, 1951.

SVV
30.6.56.
4 c.

Although the settlement fees cannot be recovered as arrears of land revenue, they can be added to the mortgage amount and claimed from the mortgagor in a suit filed by the mortgagor for redemption of mortgage. The time for filing a redemption suit has not yet expired. Consequently the settlement fees should not be written of until a suit for redemption is time-barred.

Sd./-
29/10
Remembrancer of Legal Affairs.

U.R. to R.D., No. 17296; dated the 2nd November, 1951.

SVV
30.6.56.
4c.

Legal Department.

The view taken by the Government Pleader, Kolhapur is correct. Under section 53(1) of the Transfer of Property Act, every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed; but nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration. This provision means that if a person acquires property for value in good faith, i.e., without being a party to the transfer with any design on the part of the transferor to defeat or delay the creditors, his rights will not be affected by the section although the transferor's intention may have been fraudulent (see Isham Chunder v. Bishu Sirdar, 24 Calcutta 825 citing Wood v. Dixie (1845) 7 Queen's Bench 892). It is possible to hold that the transferor in the present case being the father of the licensee should have known that the licensee was in arrears and his property would be sold for the recovery of those arrears. In other words, it is possible that the transferor's intention in selling the land to Shri Tulshiram Tukaram Bhadwankar may have been fraudulent but that would not be sufficient to hold that the whole transaction is fraudulent and voidable under section 53 of the Transfer of Property Act, unless it could be established that the transferee was also a party to the fraud. In the present case there does not appear to be any material warranting the conclusion that the transferee was a party to the fraud. He has purchased the property for value and has since been in possession of it. There is nothing to prove his bad faith in purchasing the land. In circumstances, it appears that it would not be possible for Government to avoid the sale of the land to Shri Tulshiram.

Addl. Secy.

U.R. to R.D., No. 16097, dated 25-10-51

L.D. R.I. No. 20857
dt. 4-10-1951.

submitted with reference to the note of the R.D. at p. 39 ante.

For the facts of the case, please see the letter dated 11-9-1951 of the Director of Excise and Prohibition at p. 39 ante.

Shri Nijappa and Nillikarjun Basappa Charati of Ajra, District Kolhapur request that the property purchased by them from Shri Appa Khedekar may not be proceeded against for recovering the entire arrears due from Shri Appa Adbul Khedekar who stood surety for his son Shri Adam Appa Khedekar, ex-Excise Licensee. The R.L.A. has been requested to advise in the matter.

STV
30.4.52.
4 c.

Legal Department.

Seen and returned.

Attention is invited to the Additional Secretary's opinion No . 16997, dated the 25th October, 1951, which applies to the present case also.

Additional Secretary to Government.

U.R. to R.D., No. 17635; dated the 7th November, 1951.

SVV
30.6.56.
4 c.